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IN THE

Supreme Court Of The United States

October Term, 1986

AMERICAN CAST IRON PIPE COMPANY,

Petitioner

vs.

ANNETTE COX, et al.,

Respondents

REPLY BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

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The Petitioner continues to exaggerate the law and facts in their reply brief in an effort to lend an air of importance to an issue which has not created any conflict in the Circuits and which was correctly decided by the Court below. For the most part, the Petitioner's reply brief merely repeats the same points and authorities made in the Petition itself. There is no need to further belabor such matters and the Respondents simply refer the Court to their original Brief In Opposition as their reply to such points. There are, however, several things said in the Petitioner's Reply Brief that are new and misleading. This Reply is limited to the latter points.

I. The Petitioners' Argument Destroys Any "Bright Line" Rule And Would Leave Litigants With No Clear Understanding Of When The Time For Appeal Begins To Run

It is ironic that the Petitioner argues that its approach to Rule 54 (b) and appellate Rule 4 (a) (4) provides a "bright line rule" for practitioners and the courts to follow in deciding when to appeal. In fact, it does the exact opposite. The defendant argues that when a Rule 54 (b) certificate and judgment is entered as to less than all the parties or issues, the litigants should ignore that judgment if they subjectively believe that there is "overlap" between the issues severed for appeal and those left in the trial court. They even go so far as to say that the parties should ignore the Rule 54 (b) judgment when there is *no* Rule 59 motion or other challenge filed *subsequent* to the Rule 54 (b) judgment which suspends the time for appeal.[1] Such an approach obviously does not provide a "bright line" for litigants or the courts, but instead allows the appellate time – filing requirements to degenerate into a quagmire of disputes and subjective judgments about whether par-

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[1]The Petitioner, for the first time in the history of this case, has argued that the Rule 54 (b) judgment was invalid even though it was entered by the district court and accepted by the Court of Appeals. While the Respondent contends that the Rule 54 (b) judgment was plainly valid, the Petitioner has nevertheless waived this point by not timely raising it in the courts below. If a party believed that the Rule 54 (b) certification and judgment was improvidently entered, he is bound to file a *new* Rule 59 motion which suspends the time for appeal from the Rule 54 (b) judgment or to otherwise challenge the propriety of the judgment in a timely manner. A party cannot just stand idly by while the clock ticks and his opponent relies on the Rule 54 (b) judgment to his detriment. The Petitioner in the current case has done exactly that. It has waited over two years before it has argued that the Rule 54 (b) judgment was invalid. It never filed a Rule 59 motion or any other challenge to the Rule 54 (b) judgment after it was entered. Petitioner should now be estopped from seeking to challenge that judgment because of their failure to timely raise the issue in the district court during the period in which that court could have corrected any deficiency in it and the Respondents' reliance on that judgment as the commencement of the time for appeal could have been avoided.

ticular Rule 54 (b) judgments are valid commencements of the time for appealing and whether particular *antecedent* Rule 59 motions are sufficiently related to the issues in the Rule 54 (b) judgment to justify ignoring such judgment.

The Petitioner's approach to the rules is completely unworkable. Litigants must have an objective "bright line" commencement of the time for appealing which does not depend upon delicately balanced subjective judgments about relatedness of one issue in the lawsuit with another. It is the district court, and not the litigant, who is charged with making such judgments under Rule 54 (b). Once the district court has done so, there is no "bright line" if the parties are required to secondguess the district court on the question of relatedness or the propriety of an immediate appeal. The only true "bright line" is the one that has always existed: when a final judgment is entered pursuant to Rule 54 (b) the time for appeal *automatically* begins to run and expires in 30 days unless a *subsequent* Rule 59 motion is filed which suspends the time for appeal. The mere existence of Rule 59 motions which *precede* the Rule 54 (b) judgment is not enough to suspend the time to appeal from the latter judgment because that would require the parties to judge at their peril whether the issues remaining in the trial court are sufficiently related to the issues severed in the Rule 54 (b) judgment to justify ignoring the latter judgment.[2] No competent attorney is going to put his client or himself at such a risk. Protective appeals will become the

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[2]The defendant argues that *Behring International, Inc. v. Imperial Iranian Air Force,* 699 F.2d 357 (3rd Cir.), *reh'g denied,* 712 F.2d 45 (3rd Cir. 1983), supports its position. The latter case, however, did not involve a denial of a Rule 59 motion and entry of a *new* judgment under Rule 54 (b) which was never suspended by any subsequent Rule 59 motions. The situation in *Behring* simply involved a single original judgment under Rule 54 (b) with a subsequent Rule 59 motion which suspended the time for appeal. In that garden variety context, the appealing party was never put in the dilemma of having to ignore a *new* judgment entered *after* the filing of all Rule 59 motions. To the extent that *Behring* can be argued to support placing litigants in that perilous position or to support a requirement that litigants ignore certain judgments when they subjectively believe that they were improperly entered, it is simply wrong.

norm and any economy or benefit which might hypothetically accrue from the Petitioner's subjective system will quickly become academic because of the danger involved in secondguessing the district court's determination to sever certain issues under Rule 54 (b).

The current case is an excellent example of the disruptive effect of the Petitioner's interpretation of Rules 54 (b) and 4 (a) (4). There has been a great deal of judicial time and energy spent in trying to decide whether the issues severed by the district court's Rule 54 (b) judgment were sufficiently related to the issues left in the trial court to vitiate the effect of the latter judgment. The district court and the Court of Appeals have held that the Rule 54 (b) judgment properly triggered the time for appeal. The Petitioner, however, continues to disagree. There is nothing whatsoever that is "bright line" about such an ambiguous and perilous determination of when the time for appeal commences.

For all the foregoing reasons, the Respondents believe that the only workable approach to Rule 54 (b) is the one that has always been followed in which district courts are permitted under Rule 54 (b) to enter judgment as to less than all the parties and issues and the time to appeal *automatically* begins to run unless a *subsequent* Rule 59 motion is filed which suspends the time for appeal from the Rule 54 (b) judgment itself. *Antecedent* Rule 59 Motions cannot be allowed to suspend the time for appeal from a subsequently entered Rule 54 (b) judgment without all of the attendant ambiguities and uncertainties which accompany the determination of which such motions are sufficiently related to the Rule 54 (b) judgment to make the Rule 54 (b) judgment a nullity. The economy of the parties and the courts, and the purposes of Rule 54 (b) and appellate Rule 4 (a) (4), cannot be served by such an approach to appellate procedure which does not provide litigants with an objective "bright line" event which triggers the time for appeal.

II. The Motion Challenging The Award Of Fees Was Not Capable Of Overturning The Underlying Judgment On The Merits Because It Required The Affirmance, And Not The Reversal, Of Such Judgment

The Petitioner's argument that its motion challenging the award of the fees put in jeopardy the underlying judgment *in its own favor* against the 18 nonprevailing class members is specious. That motion necessarily required the affirmance, and not the reversal, of the underlying judgment on the merits against the 18 non-prevailing class members because that judgment was the *sine qua non* of the defendant's motion challenging the award of fees to the nonprevailing class members. The challenge to the judgment on fees was *absolutely incapable* of overturning the judgment against the 18 class members on the merits of their claims of sex discrimination. Moreover, there was no factual or legal "overlap" between the latter issue, which was severed by the Rule 54 (b) judgment, and the remaining issue concerning the amount of fees which was left in the district court for three additional weeks.[3]

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[3]The defendant purports to quote from *Acosta v. Louisiana Dept. of Health,* 106 S.Ct. 2876, 2877 (1986), when it states that "a motion contesting 'an award of attorney's fees' is a 'timely motion to alter or amend the judgment, as authorized by Federal Rule of Civil Procedure 59' ". Reply Brief, p. 4. The Respondent has searched *Acosta* and cannot find any such holding. *Acosta* only involved a Rule 59 motion filed after entry of a judgment for attorney's fees which suspended the time for appeal *from the judgment awarding fees. Acosta* does not even remotely hint that a Rule 59 motion addressed solely to the issue of fees could suspend the time for appeal from the judgment on the merits. See, *White v. New Hampshire Dept. of Emp. Sec.,* 455 U.S. 445, 451-454 (1982). The defendant has not cited a single case which has ever held that a motion contesting an award of fees should suspend the time for appeal from the original judgment on the merits. More specifically, the defendant has not cited a single case which says that a *new* judgment entered under Rule 54 (b) *after* the denial of a Rule 59 motion does not commence the time for appeal.

III. The Defendant Cannot, And Does Not, Deny That The Case Must Be Tried As A Class Action On Remand Regardless Of The Outcome Of The Current Proceedings And This Fact Moots The Entire Issue Presented

The Petitioner is entirely wrong when it asserts that the class representative, Brenda Morgan, never indicated to the Court below that she challenged the decertification of the class. The Petitioner has *never challenged* the right of the Court of Appeals to hear and decide the issues associated with decertification of the class. Those issues were briefed and argued by the Petitioner in the Court of Appeals without any indication that it questioned such review either procedurally or jurisdictionally.[4] In the court below and in the current Petition to this Court, the jurisdictional and procedural challenge has been limited to the 18 nonprevailing class members and has never been extended to the propriety of review of the class decertification issue. *Pet.*, p. 15.

The reason that the Petitioner has never challenged the propriety of review of the class decertification order is simple and unmistakable. The class representative, Brenda Morgan, filed a timely and unchallenged notice of appeal from the Final Judgment entered on the merits on April 30, 1984 which incorporated within it the class decertification order and all prior interlocutory orders which were merged within such final judgment. (App. 60). The jurisdictional statute permits appeals only from "final decisions". 28 U.S.C. Section 1291. Class cer-

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[4]The Petitioner's assertion that the plaintiffs never claimed in the court below that the class representative appealed the issue of decertification of the class is obviously a misstatement of the proceedings below. Throughout those proceedings there was never any question that the issue of class decertification was properly before the Court of Appeals by way of the Morgan appeal. While that fact was so obvious that there was never any extensive discussion of it, it was mentioned *explicitly* in oral argument in the court below. There is a record of such argument in the Court of Appeals. Since the defendant has *never* challenged the Court of Appeals' jurisdiction over the class claims, the point has never previously needed explicit discussion.

tification and decertification orders are not final or appealable until merged into a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). As Moore's Federal Practice states,[5] "[a]n appeal from the final judgment draws in question all prior non-final orders and all rulings which produced the judgment. Having thus appealed generally from the judgment, the appellant is then free to attack any part of it in his brief, or any prior nonfinal order or ruling leading up to it". *Moore's Federal Practice*, Vol. 9, Par. 203.18, p. 3-80. See also, *I.A.M. Nat. Pension Fund v. Cooper Industries, Inc.*, 789 F.2d 21, 24 (D.C. Cir. 1986); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 451 (9th Cir. 1983); *Anderson v. City of Albuquerque*, 690 F.2d 796, 798 (10th Cir. 1982); *Smith v. No. 2 Galesbury Crown Finance Corp.*, 615 F.2d 407, 421 (7th Cir. 1980); *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3rd Cir. 1977); *Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975) ("This class determination is appealed under the general rule that interlocutory orders from which no appeal lies are merged into the final judgment and open to review on appeal from that judgment.").

The Petitioner is also wrong to state that the 18 class members are being given a second chance to prove their claims without having appealed from the loss of such claims at the original trial. Like the remainder of the class, the 18 class members have never been given the opportunity to participate in a classwide trial because the class was erroneously decertified prior to trial. The Court of Appeals specifically remanded those 18 class members for trial as a part of a trial of a class-

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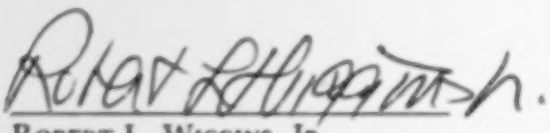
[5]The Treatise cites the following cases as support for the principle that an appeal from a final judgment permits the challenge of all prior nonfinal orders: *De Dampitan v. Administrator of Veteran Affairs*, 516 F.2d 708 (D.C. Cir. 1974); *Herron v. Rozelle*, 480 F.2d 282 (10th Cir. 1973); *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961); *Ford Motor Co. v. Busam Motor Sales*, 185 F.2d 531 (6th Cir. 1950); *Roth v. Hyer*, 142 F.2d 227 (5th Cir. 1944), *cert. denied*, (1944), 323 U.S. 712, 65 S.Ct. 38, 89 L.Ed. 573. See also, *Mt. Reed Construction Co. v. Virginia Metal Products*, 214 F.2d 127 (5th Cir. 1954); *Roth v. Hyer*, 142 F.2d 227 (5th Cir. 1944), *cert. denied*, 323 U.S. 712 (1944).

wide "pattern and practice" of sex discrimination. (App. 26). The status of these 18 class members in such a classwide trial is distinctly different from the thoroughly abusive individualized trial process which they were put through at the original trial. See e.g., *Sledge v. J. P. Stevens & Co., Inc.*, 585 F.2d 625, 636-39 (4th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979) (Individual class members testifying at original trial are entitled on remand to participate in classwide bifurcated trial regardless of disposition of their individual claims because burdens of proof and issues in classwide trial are different than in individualized trials.).

CONCLUSION

For all the foregoing reasons, there is nothing in the Petitioner's reply brief which changes the conclusion that this case is not one which should be reviewed by the Court.

Respectfully submitted,



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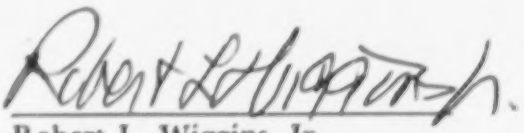
PROOF OF SERVICE

I, Robert L. Wiggins, Jr., a member of the Bar of this Court, as counsel of record for respondents, herein, Annette Cox, et al., hereby certify that three copies of the above and foregoing Reply Brief has been served by United States mail, postage prepaid and properly addressed on this the 26th day of September, 1986, upon counsel for petitioner, F. A. Flowers, III, Attorney at Law, 3000 SouthTrust Tower, Birmingham, Alabama 35203.

It is also certified that all parties required to be served have been served.



Robert L. Wiggins, Jr.